SINGAPORE REPORTS

P.H. GRACE PTE. LTD. & ORS. v. AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION

[C.A. (Wee Chong Jin C.J., Thean & Chua JJ.)
October 21, 1986]

[Singapore – Civil Appeal No. 69 of 1985]

Practice and Procedure – Summary judgment – Application for – Counterclaim by defendants – Stay of execution – Application for – Whether counterclaim bona fide.

Guarantee – Whether guarantors can avail themselves of the counterclaim of the principal debtor.

The plaintiffs are bankers and claimed against their customer, the first defendant, a sum of $1,395,331.39, being the balance of the moneys lent by them to the first defendant and for moneys paid by them as bankers for and at the request of the first defendant, together with interest on all such moneys and also claimed the same amount against the second, third and fourth defendants as guarantors of the first defendant under a guarantee in writing dated April 23, 1984. The plaintiffs applied for summary judgment under Order 14 of the Rules of Supreme Court against all the defendants.

Before the hearing of the application the amount owing to the plaintiffs had been reduced to $640,565.32 and accordingly, at the hearing before the Senior Assistant Registrar, the plaintiffs asked for judgment for the sum of $640,565.32 together with interest and costs. The application was resisted by the defendants; they disputed the amount owing and claimed, *inter alia*, that the plaintiffs were in breach of the contract with the first defendant relating to the grant of banking facilities to the first defendant. The Senior Assistant Registrar gave judgment to the plaintiffs in the sum of $640,565.32 together with interest as claimed and costs.

The defendants appealed against that decision to the Judge in chambers. The learned Judge dismissed the appeal with costs but granted to the first defendant leave to proceed with the counterclaim against the plaintiffs; however he refused to grant a stay of execution on the judgment pending the determination of the counterclaim. This appeal was brought against the decision of the learned Judge.

Held, dismissing the appeal: (1) on the affidavits filed it cannot reasonably be said that there was no prospect of the counterclaim succeeding if it was brought to trial; it was a *bona fide* counterclaim;

(2) in the present circumstances the plaintiffs should not be put to expense in proving their claim and judgment obtained should therefore remain undisturbed;

(3) the learned Judge ought to have granted to the first defendant a stay of execution on the judgment. However, since then a winding-up order had been made against the first defendant, it has become unnecessary for the present court to grant a stay which it would otherwise be disposed to grant;

(4) although at common law the second, third and fourth defendants are entitled to avail themselves of the counterclaim of the first defendant, in the present case there should be no stay of execution on the judgment against the second, third and fourth defendants.

Cases referred to:

(1) *Morgan & Son Ltd.* v. *S. Martin Johnson & Co. Ltd.* [1949] 1 K.B. 107.
(2) *Adam & Harvey Ltd.* v. *International Maritime Supplies Co. Ltd.* [1966] 1 Lloyd's Rep. 571.
(3) *Sheppards & Co.* v. *Wilkinson & Jarvis* (1889) 6 T.L.R. 13.
(4) *Continental Illinois National Bank & Trust Company of Chicago* v. *Papanicolaou* (*The Times*, July 15, 1986).
(5) *Hanak* v. *Green* [1958] 2 Q.B. 9, 23.
(6) *British Anzani (Felixstowe) Ltd.* v. *International Marine Management (U.K.) Ltd.* [1980] 1 Q.B. 137.
(7) *Bechervaise* v. *Lewis* (1872) L.R. 7 C.P. 372.
(8) *Reardon Smith Line* v. *Hansen-Tangen* [1976] 1 W.L.R. 989, 997.
(9) *Hyundai Shipbuilding & Heavy Industries Co. Ltd.* v. *Pournaras* [1978] 2 Lloyd's Rep. 502.
(10) *Hyundai Heavy Industries Co. Ltd.* v. *Papadopoulous & Ors.* [1980] 1 W.L.R. 1129.
(11) *Lep Air Services Ltd.* v. *Rolloswin Investment Ltd.* [1973] A.C. 331, 355.

COURT OF APPEAL.

Simon Yuen for the appellants.
Denis Singham for the respondents.

Cur. Adv. Vult.

Thean J. (delivering the Judgment of the court): The plaintiffs are bankers, and claimed against their customer, the 1st defendant, a sum of $1,395,331.39, being the balance of the moneys lent by them to the 1st defendant and for moneys paid by them, as bankers for and at the request of the 1st defendant, together with interest on all such moneys and also claimed the same amount against the 2nd, 3rd and 4th defendants, as guarantors of the 1st defendant under a guarantee in writing dated April 23, 1984. They, the plaintiffs, applied for summary judgment under Order 14 of the Rules of Supreme Court against all the defendants. Before the hearing of the application, the amount owing to the plaintiffs had been reduced to $640,565.32 and, accordingly, at the hearing before the Senior Assistant Registrar, the plaintiffs asked for judgment for the sum of $640,565.32 together with interest and costs. The application was resisted by the defendants; they disputed the amount owing, and claimed, *inter alia*, that the plaintiffs were in breach of the contract with the 1st defendant relating to the grant of banking faci-

lities to the 1st defendant. The breaches complained of principally were: (i) that the plaintiffs wrongfully refused to make payments under certain irrevocable letters of credit opened by the plaintiffs as the 1st defendant's bankers, and (ii) that the plaintiffs on a number of occasions wrongfully refused to release to the 1st defendant goods pledged to the plaintiffs in exchange for trust receipts therefor, and in consequence the 1st defendant had suffered loss and damage. The Senior Assistant Registrar gave judgment to the plaintiffs in the sum of $640,565.32 together with interest as claimed and costs.

Against that decision the defendants appealed to the Judge in chambers. At the hearing of the appeal before the learned Judge, the defendants did not dispute the amount of $640,565.32 as owing to the plaintiffs but contended that the 1st defendant had a counterclaim against the plaintiffs for damages for breach of contract and, accordingly, the defendants should be given unconditional leave to defend. The learned Judge dismissed the appeal with costs but granted to the 1st defendant leave to proceed with the counterclaim against the plaintiffs; he refused to grant a stay of execution on the judgment pending the determination of the counterclaim. Against the decision of the learned Judge this appeal is now brought.

Before us, Mr. Yuen for the defendants did not dispute the amount owed by the 1st defendant to the plaintiffs, namely: the sum of $640,565.32 together with interest thereon. Nor did he dispute that the 2nd, 3rd and 4th defendants are guarantors of the 1st defendant for such amount and interest. He contended, however, that the 1st defendant had a *bona fide* counterclaim against the plaintiffs for damages for breach of contract, and the defendants should be given unconditional leave to defend. He relied on *Morgan & Son, Ltd.* v. *S. Martin Johnson & Company, Ltd.*[1] In that case the plaintiff claimed for a liquidated sum of money for storage of defendant's vehicles. The defendant alleged that one of its vehicles was lost while being stored by the plaintiff and claimed against the latter, as an equitable set-off, damages for breach of contract and breach of duty as a bailee and also for negligence. The Court of Appeal in England held that as the defendant had a *bona fide* claim which could be set up as an equitable set-off against the amount claimed by the plaintiff, unconditional leave to defend should be given to the defendant. Mr. Yuen also relied on *Adam & Harvey, Ltd.* v. *International Maritime Supplies Company, Ltd.*[2] where the Court of Appeal held that where there was a counterclaim, whatever its merits might be, the defendant should be given unconditional leave to defend. Next and in the alternative, Mr. Yuen argued that if unconditional leave to defend was refused, then in view of the *bona fide* counterclaim of the 1st defendant, a stay of execution on the judgment should be granted until the counterclaim has been tried and decided upon. In support he relied on *Sheppards & Co.* v. *Wilkinson & Jarvis.*[3] There the plaintiffs claimed for a sum of £7,500 advanced to the defendants. The latter alleged that certain agreements had been entered into between them and the plaintiffs, in accordance with which the sum was advanced, and they counterclaimed that the plaintiffs were in breach of the agreements. The Court of Appeal held that if it was clear that the claim must succeed and that there was really no defence to it, the plaintiffs should not be put to expense of proving the claim and there ought to be judgment but execution on the judgment should be stayed until the counterclaim had been tried.

In response, Mr. Singham for the plaintiffs argued that there was really no dispute as to the amount claimed by the plaintiffs. The judgment therefore should remain undisturbed. As for the stay of execution, he relied on the recent decision of the Court of Appeal in England in *Continental Illinois National Bank & Trust Company of Chicago* v. *Papanicolaou*[4] which we shall discuss shortly, and submitted that no stay of execution on the judgment ought to be granted pending the determination of the 1st defendant's counterclaim against the plaintiffs.

The principles as to whether on an application for judgment under Order 14, where a counterclaim has been raised by the defendant, judgment should, notwithstanding the counterclaim, be given to the plaintiff, and if such judgment be given whether execution thereon should be stayed are briefly set out in the following part of the judgment of Lord Esher, M.R. in *Sheppards & Co.* v. *Wilkinson & Jarvis.*[3]

> "The court had no power to try such a counter-claim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded. If the counter-claim was for a less sum than that claimed, then judgment might be signed if there was no real defence for so much of the amount of the claim as was not covered by the counter-claim; but if the counter-claim over-topped the claim and was really plausible, then the rule, which had been often acted upon at Chambers, of allowing the defend-

ant to defend without conditions was the right one. There were, however, circumstances which might call on the Court, as in the present case, to act differently. If it was clear that the claim must succeed, and there was really no defence to it, and the plaintiff would only be put to expense in proving his claim, then there ought to be judgment on the claim, but the matter must be so dealt with that the defendants who had a plausible counter-claim must not be injured. That could be done by staying execution on the judgment until the counter-claim had been tried."

The approach, therefore, is to determine, first, whether it is "not unreasonably possible" for the counterclaim of the 1st defendant to succeed if brought to trial. The case so far as presented by the defendants is that the 1st defendant has a cross-claim against the plaintiffs for damages for breach of contract, and the claim is this. By a letter of April 18, 1984, the plaintiffs agreed to grant to the 1st defendant banking facilities in the form of, *inter alia*, establishing for the 1st defendant irrevocable documentary letters of credit and financing goods purchased by the 1st defendant by the use of trust receipts. The terms of this letter had been accepted by the 1st defendant and pursuant to the arrangement various letters of credit were opened by the plaintiffs in favour of suppliers of goods to the 1st defendant. The 1st defendant complained that in breach of such agreement, the plaintiffs wrongfully refused to effect payments under certain irrevocable letters of credit opened by them on the alleged ground of discrepancies in the documents, which discrepancies, however, the 1st defendant said had been resolved by the 1st defendant instructing the plaintiffs to effect payments notwithstanding the discrepancies. The 1st defendant also alleged that in a number of transactions where goods purchased by the 1st defendant and pledged to the plaintiffs were to be released to the 1st defendant upon delivery of trust receipts, the plaintiffs in breach of the agreement wrongfully refused to release such goods except upon full payment therefor by the 1st defendant. These complaints, if established, would afford to the 1st defendant a valid claim against the plaintiffs for damages for breach of contract. At this stage, however, it is not for the court to inquire into the merits of such a claim; the only point for consideration is whether it is a *bona fide* claim. On the affidavits filed it cannot reasonably be said that there is no prospect of the counterclaim succeeding if it is brought to trial; it is, in our opinion, a *bona fide* counterclaim.

The next question then is whether in the circumstances of this case we ought "to act differently" and allow the judgment obtained against the defendants to stand. Now, it has not been argued, both here and below, whether this cross-claim of the 1st defendant would constitute an equitable set-off against the claim of the plaintiffs – a set-off falling within the third category of set-offs described by Morris L.J. (as he then was) in *Hanak v. Green.*[5] If such a cross-claim can be presented as an equitable set-off, the 1st defendant would be entitled to unconditional leave to defend: see *Morgan & Son, Ltd.* v. *S. Martin Johnson & Company, Ltd. (supra)* and *British Anzani (Felixstowe) Ltd.* v. *International Marine Management (U.K.) Ltd.*[6] The first case, which was cited by Mr. Yuen, was decided on the basis that the cross-claim of the defendant was an equitable set-off against the claim of the plaintiff and on that ground the court held that the defendant was entitled to unconditional leave to defend. In the second case, the preliminary issue before the court was whether the cross-claim of the defendant for damages for breach of obligations on the part of the landlord, the plaintiff, could be set off as a defence to the claim of the latter for payment of rent and/or mesne profits, and Forbes J. held that the cross-claim of the defendant could be raised as an equitable set-off. In this appeal, no analysis of the nature of the cross-claim of the 1st defendant has been made and no argument has been addressed to us to the effect that such a cross-claim is an equitable set-off. Mr. Yuen has throughout treated the cross-claim of the 1st defendant as a counterclaim and the appeal has been argued on that basis. We therefore express no view as to whether the claim of the 1st defendant could – in the words of Morris L.J. – "be proudly marshalled as set-off" against the claim of the plaintiffs.

The 1st defendant is not disputing the amount owing to the plaintiffs, namely: $640,565.32 together with interest, and the 2nd, 3rd and 4th defendants are not disputing their liability for this amount as guarantors. In the circumstances, the plaintiffs should not be put to expense in proving their claim, and the judgment obtained should therefore remain undisturbed.

The last question is whether execution on the judgment should be stayed until the counterclaim of the 1st defendant has been determined. Considering, first, the position of the 1st defendant: we think that since the counterclaim is a *bona fide* one, the learned Judge ought to have granted to the 1st defendant a stay of execution on the judgment. We were informed, however, that since then a winding-up order had been made against the 1st defendant, and in view thereof it has be-

come unnecessary now for us to grant a stay which we would otherwise be disposed to grant.

We now turn to consider whether a stay of execution on the judgment should be granted in favour of the 2nd, 3rd and 4th defendants. The counterclaim as presented is that of the 1st defendant and not that of the 2nd, 3rd and 4th defendants, and though a winding-up order has been made the 1st defendant can still pursue the counterclaim against the plaintiff if its liquidator decides to do so. At common law the 2nd, 3rd and 4th defendants as guarantors of the 1st defendant are entitled to avail themselves of this counterclaim. In *Bechervaise* v. *Lewis*[7], the plaintiff sought to recover against the defendant, as surety for one Rowe on a promissory note, and the defendant pleaded that the plaintiff was in turn indebted to Rowe in an amount equal to the amount of the note. It was held that the surety was entitled to set off by way of an equitable defence the money due from the plaintiff to Rowe. Willes J. said, at page 377:

"The surety, however, has another right, *viz*. that, as soon as his obligation to pay is become absolute, he has a right in equity to be exonerated by his principal.

Thus we have a creditor who is equally liable to the principal as the principal to him, and against whom the principal has a good defence in law and equity, and a surety who is entitled in equity to call upon the principal to exonerate him.

In this state of things, we are bound to conclude that the surety has a defence in equity against the creditor; ..."

The question is whether this position at common law has been displaced by the terms of the guarantee executed by the 2nd, 3rd and 4th defendants and this, in our view, turns on the true construction of the guarantee. In construing this guarantee, the court must, in the words of Lord Wilberforce (*Reardon Smith Line* v. *Hasen-Tangen*[8] at p. 997), "place itself in thought in the same factual matrix as that in which the parties were" at the time the guarantee was executed. In this context, it is helpful to consider how the Court of Appeal in England in *Hyundai Shipbuilding & Heavy Industries Co. Ltd.* v. *Pournaras*[9] approached the problem. In that case the plaintiffs, a shipbuilder, entered into 4 shipbuilding contracts with 2 buyers for the construction for each of them 2 ships, and the contracts provided for payment of the contract prices by instalments. The contracts were guaranteed by the defendants and the material terms of each guarantee are:

"... the [defendant] hereby irrevocably and unconditionally guarantees the payment in accordance with the terms of the contract of all sums due or to become due by the buyer to you under the contract and in case the buyer is in default of any such payment the [defendant] will forthwith make the payment in default on behalf of the buyer ..."

There were defaults in payment of instalments: the first instalment was partly paid in all the 4 contracts and the second instalment which became due was not paid in one contract. These defaults were treated by the shipbuilder as a repudiation of the contracts and action was brought by them to recover from the guarantors the instalments accrued due but unpaid. The Court of Appeal construing the guarantee as a whole against "the factual matrix of the background" held that the true meaning of the guarantee was that if the buyer did not pay the instalments accrued due, the guarantors would, and refused to allow the guarantors to avail themselves of any right of set-off ensuring to the benefit of the principal debtor. Roskill L.J. (as he then was) said, at 506:

"To my mind, the right way of construing this document is not to break it down into a first and second limb but to construe it as a whole against what in a recent case in the House of Lords Lord Wilberforce called "the factual matrix of the background." The factual matrix of the background is, to my mind, plain and not susceptible of any controversy. The respondents are a yard dealing with two shipowning companies registered in Liberia, to them foreigners. I find it perfectly natural, in those circumstances, that that yard should wish to have a guarantee of payment from someone other than the persons with whom they are contracting for the construction of these four ships, the more so because these four ships were in the place of two earlier ships which the buyers had not wished to have built. It seems natural, when one looks at this as a matter of business, that in those circumstances the respondents should want the financial protection of people against whom liability could be enforced in the event of non-payment by the buyers on the due dates. It seems to me, with great respect to the argument of Mr. Thomas, that to give this guarantee the limited construction for which he contends would be flying in the face of the obvious commercial purpose of this document, one of a group of documents entered into in connection with these shipbuilding contracts."

And he later said:

"The true meaning is that if the buyer does not pay in time – in the case of the first instalment within seven days of the export licence, and in the case of the second instalment on the due date – the guarantor will pay."

Roskill L.J. also dealt with the common law right of a guarantor to avail himself of a right of set-off which a principal debtor has against the creditor, and he said, at p. 508:

"... I am, therefore, content so to assume that and that as

a matter of English law the buyers can, in principle, recover from the yard the difference (if any) between the amount of the instalments and that sum which represents the loss or damages that the yard has suffered. That being so, the question is whether these guarantors can take advantage of that right which can enure to a benefit to the principal debtor, the buyer, so as to reduce or extinguish the liabilities under the guarantees.

That that is so in principle seems to me to be undoubted. Reliance is placed in this connection upon a passage in *Halsbury's* Laws of England (4th Ed., par. 190) which reads thus:

> On being sued by the creditor for payment of the debt guaranteed, a surety may avail himself of any right to set off or counterclaim which the principal debtor possesses against the creditor, and any division of the High Court can give effect to it or to any equitable defence raised.

The same statement of law appears in Mr. Justice Rowlatt's book "Law of Principal and Surety" in the last edition for which Mr. Justice Mocatta was responsible at pp. 137 and 138. ..."

And having set out the common law position on the right of set-off, he then said:

"... The point for decision is whether it is arguable under this form of guarantee that the guarantors are entitled to the benefit of this set off (if any) so as to avoid paying the sums claimed against them in these proceedings.

I have already indicated what I regard as the factual or business background of these letters of guarantee. It seems to me that, while no doubt like many guarantees they might have been more clearly drafted, one has very little difficulty in seeing that their avowed object is to enable the yard to recover from the guarantors the amount due irrespective of the position between yard and buyers, so that the yard gets its money from the guarantors without difficulty if the yard cannot get it from the buyers. Otherwise, if one gave effect to this argument based on the principles to which I have already referred and set out in the passages in *Halsbury* and *Rowlatt*, the commercial utility of this particular form of guarantee would be wholly nullified. I do not think there is anything which militates against giving that construction to these guarantees."

The House of Lords in a similar case of *Hyundai Heavy Industries Co. Ltd.* v. *Papadopoulos & Ors.*[10] approved *Pournaras* on this point. In that case the same shipbuilder sued a guarantor under a guarantee to recover an instalment accrued due under a shipbuilding contract made between the shipbuilder and a buyer, which had come to an end by reason of the repudiation thereof by the buyer. The guarantee given was substantially in the same terms and the issues raised were similar though not identical. Lord Fraser said, at p. 1152:

"... The guarantors' promise that they would "forthwith" make the payment in default shows that the obligation became prestable immediately upon default by the buyer, and was not merely an obligation to pay any deficiency brought out in the final accounting. I agree with the view expressed by Roskill L.J. in *Hyundai Shipbuilding & Heavy Industries Ltd.* v. *Pournaras* [1978] 2 Lloyd's Rep. 502, 508 that the purpose of the guarantee was that the yard "gets its money from the guarantors without difficulty if the yard cannot get it from the buyers," and that any other construction of the letter of guarantee would mean that its commercial utility would be at least largely nullified."

In our view, the guarantee in the instant case, though not in identical terms with that in *Pournaras* case, is not dissimilar in effect. The first limb of the guarantee in so far as material reads as follows:

"We ... HEREBY GUARANTEE on demand in writing being made to us pay and satisfy the Bank all sums of money which are now or shall at any time be owing to the Bank ... on any amount whatsoever ... from the customer ...".

In addition, the other relevant provisions of the guarantee are clauses 8, 9, 18 and 19 and the material parts thereof are as follows:

"8. This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the money hereby guaranteed ... And the Bank shall have full power at its discretion to give time for payment to or make any other arrangement with any such other person or persons without prejudice to this present guarantee or any liability hereunder. And all money received by the Bank from me/us or the Customer or any person or persons liable to pay the same may be applied by the Bank to any account or item of account or to any transaction to which the same may be applicable.

9. This guarantee shall be applicable to the ultimate balance that may become due to the Bank and until repayment of such balance I/we will not be entitled as against the Bank to any right of proof in bankruptcy or insolvency of the Customer or other right of a surety discharging his liability in respect of the principal debt unless and until the ultimate balance shall have first been completely discharged and satisfied.

18. I/We waive in the Bank's favour all or any of my/our rights against the Bank or the Customer so far as may be necessary to give effect to any of the provisions of this guarantee and I/we agree that this guarantee shall be enforceable notwithstanding any change in the name of the Bank and that it shall enure for the benefit of any banking company with which the Bank may become amalgamated and to which the Bank shall assign it.

19. Though as between the Customer and me/us, I/we am/are the surety only for the Customer, yet as between myself/ourselves and the Bank, I/we shall be deemed to be principal debtor for all the monies, the payment of which is hereby guaranteed and accordingly shall not be discharged nor shall my/our liability be affected by my/our act, thing, omission or means whatever whereby my/our liability would not have been discharged if I/we had been principal debtor."

It may be said that the *Pournaras* case was decided on the "special facts", but if the language of Roskill L.J. is suitably modified to apply to the facts in the instant case, it is, we think, clear "if one looks at this as a matter of business" that "the commercial purport and obvious intent and true construction" of the guarantee in the instant case is that the "respondents should want the financial protection of people against whom liability could be enforced in the event of non-payment" by the principal debtor (see the judgment of Roskill L.J. at page 506).

Support for this view can also be found in the very recent decision of the Court of Appeal in *Continental Illinois National Bank & Trust Company of Chicago* v. *Papanicolaou*[4] which deals directly with the discretion of a judge in staying execution on a summary judgment. In that case, the bank sued three guarantors in three separate actions on the guarantees given by them respectively for loans given to the borrowers under three separate loan agreements. Each loan agreement contained, *inter alia*, provision to the effect that all payments by the borrower thereunder were to be made without set-off or counterclaim in U.S. dollars to the account of the bank; and each of the guarantees contained also provision to the effect that all payments by the guarantors thereunder were to be made without set-off or counterclaim and without deductions or withholdings whatsoever in U.S. dollars to the account of the bank. The bank applied for summary judgment against the guarantors who contended that they had a cross-claim against the bank for damages on the ground that the bank had acted negligently or had failed to carry out its duties as mortgagee. The judge who heard the application gave summary judgment to the bank but granted a stay of execution. On appeal, the Court of Appeal removed the stay, holding that the commercial purpose of the transaction was that upon default by the borrower the bank should be paid quickly and that the natural meaning of the provision of the guarantee was that all set-offs and counterclaims were to be excluded. Parker L.J. in delivering the judgment of the court equated the guarantee with a bank guarantee. The relevant part of the transcript of his judgment reads as follows:

"... Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable letter of credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud is involved, the Courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand. We can see no relevant distinction between the guarantee in that case and the guarantees presently under consideration. The purpose of both was to ensure immediate payment if the principal debtor did not pay. Indeed the present cases make it the more necessary that the court should not interfere, for here the parties have specifically provided both in the loan agreement and the guarantees that payment should be made free of any set-off or counterclaim. It would defeat the whole commercial purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment, which both the borrowers and the guarantors intended that it should have, whilst protracted proceedings on the alleged counterclaims were litigated. We do not doubt that the court has a discretion to grant a stay but it should in our view be "rarely if ever" exercised, as Lord Dilhorne said in relation to claims on bills of exchange. Guarantees such as this are the equivalent of letters of credit and only in exceptional circumstances should the court exercise its power to stay execution. The fact that a counterclaim which was likely to succeed existed would not by itself be enough, as Lord Justice Buckley pointed out. It might be that the existence of such a counterclaim coupled with cogent evidence that the bank would, if paid, be unable to meet a judgment on the counterclaim would suffice, but nothing of that nature arises here. This is a simple case where no ground for granting a stay can be shown."

True it is that in the instant case, there is no such clause specifically providing that the payment should be made free of any set-off or counterclaim, but if one examines the passage quoted above, it would be apparent that that does not form an essential part of the *ratio decidendi* of that case. That it serves only to strengthen the Court of Appeal's view is clear from the preceding words on which it is predicated: "Indeed the present cases make it the more necessary ...". Were a stay to be granted in these circumstances, it would, in our view, make nonsense of the "whole commercial purpose of suretyship" – "you would lose your guarantor at the very moment you most need him" (*per* Lord Simon in *Lep Air Services Ltd.* v. *Rolloswin Investment Ltd.*[11] at page 355). This is more so when, as in the instant case, it was not contended that the amount for which summary judgment was granted was not due.

For these reasons, we are of the opinion that there should be no stay of execution on the judgment against the 2nd, 3rd and 4th defendants. In the result, the appeal of all the defendants fails and is dismissed with costs. There will be the usual consequential order for payment to the respondents or their solicitors the deposit paid into Court as security for their costs.

Appeals dismissed.

Solicitors: *Khattar Wong & Partners; Rodyk & Davidson.*